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Soon Yee Ling & Anor v Lim Ah Hun

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–33 OF 2006(P)
ARIFIN ZAKARIA CJ (MALAYA), ZULKEFLI AND MOHD GHAZALI FCJJ
4 DECEMBER 2009

C

Contract — Sale and purchase of land — Breach — Failure to pay balance of purchase price on time — Failure by buyer to settle redemption sum — Whether redemption sum part of purchase price — Whether seller entitled to terminate agreement and forfeit deposit

D

Contract — Time — Time of the essence — Sale and purchase of property — Contract specified mandatory date of completion of sale — Failure by buyer to settle redemption sum on time — Whether purchaser entitled to rescind agreement — Contracts Act 1950 s 56(1)

E

The appellants and the respondent entered into an agreement dated 11 April 2000 ('the SPA') whereby the respondent agreed to purchase certain lands from the appellants for RM1,600,992.20. The respondent paid a deposit of RM264,992 leaving a balance of RM1,336,000. The lands were charged to two banks. The respondent was required to redeem the lands on or before 11 July 2000. Until 21 July 2000, ie the date of the termination of the agreement, the lands had not been redeemed by the respondent. Under cl 22 of the SPA, time was of essence of the agreement. The appellants, contending that the respondent had breached the SPA, gave notice to the respondent terminating the SPA and forfeiting the deposit as provided in section 11 of the First Schedule of the SPA. The learned High Court judge agreed with the appellants. That decision was however reversed by the Court of Appeal. The following two questions were posed to the Federal Court: (i) whether the appellants were entitled to terminate the SPA and to forfeit the deposit for the non-compliance by the respondent of the condition to redeem the property within the time stipulated; and (ii) whether the respondent was entitled to insist on the appellants continuing with the SPA when the respondent himself failed to redeem the property within the stipulated time.

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Held, allowing the appeal with costs here and courts below:

(1) Out of the balance purchase price, it was agreed that the respondent shall pay the full redemption for the lands to the banks within the stipulated time. For that reason, it was erroneous to treat the redemption sum as

separate from the balance purchase price. In fact it constituted the bulk of the balance purchase price. Therefore, the respondent's failure to pay the redemption sum in accordance with section 2 of the Fourth Schedule tantamount to a failure to pay the balance of the purchase price. That certainly constituted a breach of the SPA (see paras 15–16).

(2) The consequence of such breach brought into play s 56(1) of the Contracts Act 1950 as time was of the essence of the agreement. The respondent promised to pay the redemption sum on or before 11 July 2000 and failed to do. Therefore, under s 56(1), the agreement, or so much of it as had not been performed, became voidable at the option of the appellants. Thus, the notice to terminate the said agreement and forfeit the sum was in accordance with the terms and conditions of the SPA (see paras 17–19).

(3) Question (a) was answered in the positive and question (b) in the negative (see para 21).

[Bahasa Malaysia summary

Perayu-perayu dan responden menandatangani perjanjian bertarikh 11 April 2000 ('PJB') di mana responden bersetuju membeli beberapa bidang tanah daripada perayu-perayu untuk jumlah RM1,600,992.20. Responden membayar RM264,992 dan bakinya ialah RM1,336,000. Tanah-tanah tersebut dicagarkan kepada dua bank. Responden dikehendaki menebus tanah-tanah tersebut pada atau sebelum 11 Julai 2000. Sehingga 21 Julai 2000, iaitu tarikh penamatan perjanjian tersebut, tanah-tanah tersebut tidak ditebus responden. Di bawah klausa 22 PJB, masa merupakan intipati perjanjian. Perayu-perayu, menghujah bahawa responden telah melanggar PJB tersebut, memberi notis kepada responden, menamatkan PJB dan merampas wang deposit seperti yang diperuntukkan dalam seksyen 11, Jadual Pertama PJB. Hakim Mahkamah Tinggi yang bijaksana bersetuju dengan perayu-perayu. Keputusan tersebut walau bagaimanapun diakas Mahkamah Rayuan. Dua persoalan berikut diajukan ke Mahkamah Persekutuan: (i) sama ada perayu-perayu berhak menamatkan PJB dan merampas deposit disebabkan ketidakpatuhan responden terhadap syarat untuk menebus hartanah dalam tempoh yang ditetapkan; dan (ii) sama ada responden berhak untuk berkeras agar perayu-perayu meneruskan PJB apabila responden sendirinya gagal menebus hartanah dalam tempoh yang ditetapkan.

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan di Mahkamah Tinggi dan Mahkamah Rayuan:

(1) Daripada baki harga belian, adalah dipersetujui bahawa responden mesti membayar harga tebus sepenuhnya bagi tanah-tanah tersebut kepada pihak bank dalam tempoh yang ditetapkan. Atas alasan tersebut adalah salah untuk menganggap jumlah penebusan berasingan dengan baki

harga belian. Malah, jumlah tersebut merupakan jumlah besar baki harga belian. Oleh itu, kegagalan responden membayar harga penebusan berikutan seksyen 2 Jadual Keempat adalah kegagalannya membayar baki harga belian. Perkara itu semestinya pelanggaran PJB (lihat perenggan 15–16).

(2) Akibat pelanggaran tersebut membuatkan s 56(1) Akta Kontrak 1950 terpakai kerana masa merupakan intipati perjanjian. Responden berjanji membayar wang penebusan pada atau sebelum 11 Julai 2000 dan gagal berbuat demikian. Oleh itu, di bawah s 56(1), perjanjian tersebut, atau sebahagiannya yang tidak dilaksanakan, menjadi boleh batal atas pilihan perayu-perayu. Oleh itu, notis untuk menamatkan perjanjian tersebut dan merampas deposit adalah menepati terma-terma dan syarat-syarat PJB (lihat perenggan 17–19).

(3) Persoalan (a) dijawab positif dan persoalan (b) dijawab negatif (lihat perenggan 21).]

Notes

For cases on breach, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4910–4922.

For cases on time of the essence, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5508–5517.

Cases referred to

Lee Yew Hin v Kow Lup Piow [1974] 1 MLJ 114, FC (refd)

Linggi Plantations Ltd v Jagatheesan [1972] 1 MLJ 89, PC (refd)

Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors [2003] 3 MLJ 257; [2003] 3 CLJ 349, FC (refd)

UOL Credit Sdn Bhd v Dato' Vijay Kumar Natarajan [2009] MLJU 1110, FC (refd)

Yeow Kim Pong Realty Ltd v Ng Kim Pong [1962] MLJ 118, PC (refd)

Legislation referred to

Contracts Act 1950 s 56(1)

Courts of Judicature Act 1964 s 96(a)

Appeal from: Civil Appeal No P-02–63 of 2001 (Court of Appeal, Putrajaya)

Mureli Navaratnam (Viji Navaratnam with him) (Mohd Imtiaz Chong & Partners) for the appellants.

K Balasundram (Jason Ong with him) (Ong & Advocates) for the respondent.

Arifin Zakaria CJ (Malaya):

INTRODUCTION

[1] In this appeal two questions were posed to this court which reads:

(a) whether the appellants are entitled to terminate the sale and purchase agreement and to forfeit the deposit for the non-compliance by the respondent of the condition to redeem the property within the time stipulated notwithstanding there being time thereafter for the completion of the entire contract; and

(b) whether the respondent is entitled to insist on the appellants continuing with the sale and purchase agreement when the respondent himself failed to perform his obligation to redeem the property within the stipulated time.

PRELIMINARY OBJECTIONS

[2] At the outset of this appeal, the following issues were raised by way of preliminary objection, namely:

(a) The questions of law posed to the Federal Court do not come within the ambit of s 96(a) of the Courts of Judicature Act 1964 ('CJA');

(b) the questions of law posed to the Federal Court do not relate to a matter in respect of which a determination has been made by the Court of Appeal; and

(c) the fact situation envisaged by the questions posed to the Federal Court is only peculiar to this appeal.

[3] It is trite law that this court has the jurisdiction to reconsider the leave granted by another panel. The late Justice Abdul Malek Ahmad FCJ (as he then was) in *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 MLJ 257; [2003] 3 CLJ 349 (FC) observed as follows:

> The authorities showed that this court was not prevented from reconsidering the issue of leave again. The questions formulated for determination by this court were not of importance and public advantage. The questions merely relate to a set of facts in the appeal and the application of settled principles of law. Therefore, they did not come within the ambit of s 96(a) of the Courts of Judicature Act 1964. It followed that there was no necessity for this court to answer the questions posed regardless of the fact that leave to appeal had been granted.

(see *UOL Credit Sdn Bhd v Dato' Vijay Kumar Natarajan* [2009] MLJU 1110 (FC).

[4] Having considered the submissions of counsel we find no reason which warranted us to review the leave granted by the earlier panel of this court. Accordingly we dismissed the preliminary objection with costs. We proceeded

to hear the appeal on 4 November 2009.

BACKGROUND FACTS

[5] The facts in this case are not in dispute. They are briefly as follows. The appellants are the owners of three pieces of land known as Lot Nos 201, 202 and 203, Section 9W, Town of Georgetown, North East District, Penang comprised in Grant Nos 17901, 17902 and 9992 respectively ('the lands').

[6] The appellants and the respondent entered into an agreement dated 11 April 2000 ('the SPA') whereby the respondent agreed to purchase the lands at the agreed price of RM1,600,992.20. The respondent paid a deposit of RM264,992 leaving a balance sum of RM1,336,000.

[7] At the material time, the lands were charged to the Asia Commercial Finance (M) Bhd and Standard Chartered Bank Malaysia Bhd ('the banks').

[8] To finance the purchase of the lands, the respondent applied to Ban Hin Lee Bank Bhd for a loan of RM800,000. The loan was approved on 26 June 2000. However, until 21 July 2000, ie the date of the termination of the agreement, the lands had not been redeemed by the respondent.

[9] Under cl 22 of the SPA, time shall be of essence of the agreement.

[10] Taking the date of the agreement as 11 April 2000, the respondent is required to redeem the lands on or before 11 July 2000 (60 days plus one month extension). The respondent failed to do so. On that premise the appellants contended that the respondent had committed a breach of the SPA. The appellants then through their solicitor by letter dated 21 July 2000 gave notice to the respondent terminating the SPA and forfeiting the deposit as provided in section 11 of the First Schedule of the SPA.

THE ISSUE

[11] The main issue before us is whether the failure of the respondent to pay the redemption sum within the time stipulated entitles the appellants to rescind the SPA and forfeit the amount of deposit as provided in section 11 of the First Schedule ('forfeitable deposit').

[12] The learned High Court judge in his brief grounds of judgment agreed with the appellants. His reasons are as follows:

> Adalah diteliti bahawa plaintif hendaklah menebus tanah hartanah itu dalam masa dua bulan iaitu pada 10 Jun 2000 jika gagal plaintif diberi perlanjutan masa satu bulan lagi sehingga 10 Julai 2000. Nampaknya plaintif tidak membuat apa-apa dan tidak memberitahu defendan apa-apa apabila sampai tempoh 10 Jun 2000 mahupun sampai tempoh luput 10 Julai 2000. Plaintif hanya bertindak meminta dokumen-dokumen daripada defendan pada 21 Julai 2000 selepas luput tarikh seolah-olah kelewatan itu tidak berkesan dan masa bukan intipati. Maka defendan berhak bertindak menurut terma dan hasrat perjanjian itu untuk membatalkan perjanjian itu dan merampas wang cengkeram tersebut. Tindakan plaintif selepas perlucutan wang cengkeram adalah untuk menunjukkan kesungguhan plaintif agar dapat menebus kembali wang cengkeram itu. Prinsip undang-undang ialah barang siapa mengharapkan bantuan ekuiti dari mahkamah dia hendaklah terlebih dahulu berlaku adil, bertindak bona fide dan datang with *clean hands*. Saya dapati plaintif tidak wajar diberi perlindungan ekuiti. Maka saya tolak permohonannya dengan kos.

[13] On appeal the decision of the High Court was reversed. The Court of Appeal in the judgment rendered by Justice Hashim bin Yusoff JCA (as he than was) said:

> In this instant appeal, while there is provision in the event of a default in the payment of the balance of the purchase price, no provision is made in the event of default in payment of the redemption monies. It is not for the court to rewrite the SPA to provide for the omission.

That forms the basis of the Court of Appeal's finding.

[14] Learned counsel for the appellants contended that the Court of Appeal erred in failing to appreciate that the term 'balance purchase price' should properly include the redemption sum. He relies in the main on cl 7(a) of the SPA in support of his contention which reads:

> The *Balance Purchase Price shall first be applied towards payment of the redemption moneys, if any, due and owing by the Vendor in respect of any charge or encumbrance over the said Property*. Before payment over to the Vendor such redemption moneys at the discretion of the Purchaser be paid directly to the Chargee or body or person concerned with such encumbrance. (Emphasis added.)

[15] In this case, the agreed purchase price was RM1,600,992.20 and the deposit of RM264,992 was paid by the respondent upon the execution of the agreement, leaving a balance sum of RM1,336,000 to be paid by the respondent. Out of the balance sum it is agreed that the respondent shall pay the full redemption for the lands to the banks within the stipulated time. This is contained in section 2 of the Fourth Schedule which reads:

> *The Purchaser shall pay the full redemption* for the said Property owing by the Vendor to Standard Chartered Bank Malaysia Berhad and Asia Commercial Finance (M) Berhad *within sixty (60) days from the date hereof with an extension of one (1) month*. (Emphasis added.)

For that reason we agree with learned counsel for the appellants that it is erroneous to treat the redemption sum as separate from the balance purchase price. In fact it constitutes the bulk of the balance purchase price.

[16] For the above reason we hold that the redemption sum forms part of the balance purchase price. Therefore, any failure on the part of the respondent to pay the redemption sum in accordance with section 2 of the Fourth Schedule would tantamount to a failure on the part of the respondent to pay the balance of the purchase price. That certainly constitutes a breach of the SPA.

[17] What is the consequence of such breach? This is provided in cl 8 of the SPA which reads:

> If the Purchaser shall fail to pay the *Balance Purchase Price or any part thereof* pursuant to Clause 2 above, the amount stipulated in Section 11 of the First Schedule hereto paid by the Purchaser under Clause 1 above shall be forfeited absolutely to the Vendor as agreed liquidated damages and the Vendor shall at the time of such forfeiture refund to the Purchaser any other money paid by the Purchaser to account of the Purchase Price free of interest, whereupon this Agreement shall become null and void and of no further effect and neither party shall have any claim whatsoever against the other under or in respect of this Agreement (save the return of any documents belonging to the Vendor held by the Purchaser or the Purchaser's Solicitors) and the Vendor shall have the rights to re-sell the said Property to such person in such manner at such price and on such terms as the Vendor may think fit and the Purchaser shall have no right to any part of the purchase money thereby arising. (Emphasis added.)

[18] This also brings into play s 56(1) of the Contracts Act 1950 as the parties to the SPA has agreed that time shall be of the essence of the agreement (see cl 22 of the SPA). In the present case the respondent promised to pay the redemption sum on or before 11 July 2000 and has failed to do so at or before the specified time. Therefore, under s 56(1), the agreement, or so much of it as has not been performed, becomes voidable at the option of the appellants.

[19] The appellants through their solicitor by letter dated 21 July 2000 had given notice to the respondent to terminate the said agreement and forfeit the sum as set out in section 11 of the First Schedule of the SPA. This in our judgment is in accord with the terms and conditions of the SPA. In support of our decision we refer to the case of *Yeow Kim Pong Realty Ltd v Ng Kim Pong* [1962] MLJ 118 (PC). In that case, the purchaser entered into an agreement with the vendor for the purchase of 22 lots of lands. It was one of the terms of

the agreement that an initial payment of $15,000 should be made followed by a further sum of $24,000 on or before 28 June 1956 and a final payment of $27,000 on or before 23 December 1956. The purchaser failed to pay the stipulated $24,000 by the date specified and he was informed by the vendor that in consequence the deposit of $15,000 was forfeited and the contract was at an end. Following the failure of the purchaser to pay the second payment of $24,000, the vendor upon request of the purchaser agreed to grant an extension for which a supplementary agreement was entered into. As the purchaser failed to abide by the supplementary agreement, the vendor terminated the agreement by writing on 1 September 1956 and forfeited the monies paid. On appeal the Privy Council held that the supplementary agreement was binding on the parties and time was of the essence of the agreement. There was a breach of the agreement by the purchaser and the vendor was entitled to rescind the contract on 1 September 1956 as he did (see also *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89 (PC)).

[20] In *Lee Yew Hin v Kow Lup Piow* [1974] 1 MLJ 114 (FC), Justice Gill FCJ (as he then was) observed as follows:

> In my judgment, the true construction of the agreement here is that the plaintiff was required to make his final payment to Loy by that date. Contract differs from most other branches of the law of obligations in one important respect, namely, that generally speaking the parties themselves are free to make their own rules as to what shall and shall not bind them (see *Chitty on Contracts* (23rd Ed) at p 1). The plaintiff had clearly bound himself to pay the balance of the purchase price on 20 November 1967. Once he had committed a breach of that agreement, the defendant was entitled to repudiate the contract and forfeit the deposit under cl 14 of the agreement.

This further fortifies our decision in the present case.

CONCLUSION

[21] For the above reasons, we would answer question (a) in the positive and question (b) in the negative. The appeal is accordingly allowed and the decision of the learned High Court judge is reinstated. Costs both here and in the courts below be awarded to the appellants. Deposit to be refunded to the appellants.

Appeal allowed with costs here and courts below.

Reported by Kanesh Sundrum